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No. 712

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

C. W. PAYTON AND BESSIE JOYCE PAYTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 713

C. W. PAYTON AND BESSIE JOYCE PAYTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The opinion of the court of appeals (Pet. App. A1-A7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1970. A petition for rehearing was denied on June 24, 1970 (Pet. App. B1). The petition for a

writ of certiorari was filed on September 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that Payton Optical Company was not a family partnership for income tax purposes and, therefore, that its income could not be split among its partners, but was taxable in full to petitioner.

2. Whether petitioner was denied his constitutional rights when the court of appeals decided this cause on the basis of the briefs and the record without oral argument.

STATUTE AND RULES INVOLVED

The statute and rules involved are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

Petitioner [1] was an ophthalmologist in the practice of examining patients for eye defects and prescribing eye-glass lenses where necessary. In addition, he was the sole proprietor of the Payton Optical Company (hereinafter referred to as the proprietorship), which filled the majority of his prescriptions and was located in the same building as his office. On June 1, 1961, petitioner created five irrevocable

[1] References to "petitioner" are to C. W. Payton. Bessie Joyce Payton is a party to these proceedings solely because of the filing of a joint income tax return.

trusts—one for each of his minor daughters—to which certain property was transferred with the provision that petitioner would be trustee and that the trusts would terminate when the respective beneficiaries reached age 21, or upon their death, if earlier, with the trust corpus then reverting to petitioner. (Pet. App. A2.)

On November 24, 1962, petitioner purportedly gave a 12 percent interest in the proprietorship to each of the five trusts. That same day, an alleged partnership was formed to carry on the optical dispensing business formerly carried on by the proprietorship. Petitioner had a 40 percent interest in this partnership and was the managing partner, while each of the five trusts held a 12 percent interest. The partnership was to commence on September 1, 1962, and terminate on May 24, 1972. On March 8, 1963, petitioner created an additional trust for the benefit of his minor son, similar to the earlier trusts, and conveyed a 15 percent interest in the partnership to this trust. The partnership agreement was amended to reflect this change. After the effective date of the partnership agreement, the lens dispensing business of the partnership, except for accounting procedures, was operated in precisely the same manner as prior to the transfers. Its location, management, staff, the manner in which it was held out and known to the public, and the source of its business and income remained unchanged. No services or material amount of capital were provided by the trusts or their beneficiaries. (Pet. App. A3, A6-A7.)

Petitioner contended below that the partnership with the trusts was bona fide and, therefore, that income allocable to the trusts' interests in the alleged partnership was not taxable to him. Following a trial, the district court denied the government's motion for a directed verdict, and the jury answered a special interrogatory favorably to petitioner (Pet. App. C1-C2). This resulted in a judgment for petitioner when the district court denied the government's motion for judgment n.o.v. On appeal, the Fifth Circuit found (Pet. App. A6) that the "undisputed facts and inferences permissible therefrom point so strongly and conclusively against the existence of a bona fide family partnership that reasonable men could not arrive at a contrary verdict." It accordingly reversed and remanded the case with instructions to the district court to enter judgment n.o.v. for the United States.

ARGUMENT

The decision below is correct. There is no conflict of decisions or other occasion for further review.

1. Section 704(e) of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 9-10) provides that a person (including a trust) may be recognized as a partner in a family partnership if he owns a capital interest in a partnership in which capital is a material income-producing factor, even if that interest was created by gift. That provision, however, does not relax the standards for determining whether the donee actually owns the interest purportedly given or whether, although the transaction is not a sham, the donor has retained so many incidents of owner-

ship that he must continue to be recognized as the actual owner of the partnership interest. *Spiesman* v. *Commissioner*, 260 F.2d 940 (C.A. 9). Thus, in this case, petitioner was required to establish both that capital was a material income producing factor, and that the parties truly intended to conduct a partnership in the substantive sense of the word. See *Commissioner* v. *Culbertson*, 337 U.S. 733.

The court below correctly concluded that petitioner failed to meet either of these requirements. Prior to the partnership's formation, petitioner was conducting a profitable and established optical dispensing business side-by-side with his professional practice. Capital was an insignificant aspect of the business, and customers were derived largely from petitioner's own professional practice. After the formation of the partnership, the optical dispensing business continued as before, unchanged as to location, management, staff, the manner in which it was held out and known to the public, the source of its business and income, and with no services or material amount of capital being provided by the trusts. Because petitioner never gave up his control of the business, and because capital was not a material income-producing factor in the business, the partnership form had no economic reality and was no more than an income-splitting device designed to take advantage of lower marginal tax rates. Under these circumstances, the arrangement cannot be treated as a family partnership for tax purposes.

2. Petitioner contends (Pet. 11) that he was denied his constitutional rights because a jury verdict

in his favor was reversed without oral argument. This contention, made for the first time in this Court, is without merit.

This case was placed upon the summary calendar of the court of appeals to be determined without oral argument only after the observance of a careful procedure designed to safeguard procedural due process. See *Murphy* v. *Houma Well Service*, 409 F.2d 804 (C.A. 5); *Huth* v. *Southern Pacific Co.*, 417 F.2d 526, 527-530 (C.A. 5). The action was taken only after submission of the record and all briefs of the parties, and only after a panel of three active federal judges had agreed that oral argument would not be helpful to them in deciding this particular case. If, after the case was placed on the summary calendar, any member of the panel had any doubts as to the proposed opinion, the case would automatically have been removed from that calendar and set for oral argument. *Murphy* v. *Houma*, *supra*.

In *Communications' Comm'n* v. *WJR*, 337 U.S. 265, 274-277, this Court rejected the proposition that oral argument is constitutionally required, stating (p. 276):

> * * * that the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. * * *

The process of judicial selectivity followed by the court below in the light of arguments made by the

parties in their briefs satisfied both the demands and underlying spirit of *Communications Comm'n* v. *WJR*, *supra*.[2] Petitioner has not shown that denial of oral argument infringed his constitutional rights or was an abuse of discretion by the court of appeals. See *Groendyke Transport, Inc.* v. *Davis*, 406 F.2d 1158, 1161-1163 (C.A. 5), certiorari denied, 394 U.S. 1012; *Magnesium Casting Co.* v. *Hoban*, 401 F.2d 516 (C.A. 1), certiorari denied, 393 U.S. 1065.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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Assistant Attorney General.

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[2] It is also consonant with the powers delegated to the courts of appeals by this Court in Rule 34(b) of the Federal Rules of Appellate Procedure (Appendix, *infra*, p. 10) that, unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for oral argument. See also Rules of the United States Court of Appeals for the Fifth Circuit, Rules 17 through 20 (Appendix, *infra*, pp. 10-12).

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 704. PARTNER'S DISTRIBUTIVE SHARE.

* * * *

(e) *Family Partnerships.*—

(1) *Recognition of interest created by purchase or gift.*—A person shall be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

(2) *Distributive share of donee includible in gross income.*—In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service.

(3) *Purchase of interest by member of family.*—For purposes of this section, an interest purchased by one member of a family from another shall be considered to

be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trusts for the primary benefit of such persons.

Federal Rules of Appellate Procedure:

RULE 34

ORAL ARGUMENT

* * * *

(b) *Time Allowed for Argument.* Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

* * * *

Rules of the United States Court of Appeals for the Fifth Circuit:

RULE 17

DOCKET CONTROL

In the interest of docket control, the chief judge may from time to time, in his discretion,

appoint a panel or panels to review pending cases for appropriate assignment or disposition under Rules 18, 19 or 20 or any other rule of this court.

RULE 18

Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(2) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

RULE 19

Motion to Dismiss or Affirm

Within fifteen days after the appeal has been docketed in this court, the appellee may file a motion to dismiss or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss. The fifteen-day provision may be waived by the court on proper showing of reasonable excuse for delay in filing a motion to dismiss or affirm, upon such terms and conditions as the court may prescribe, or such waiver may be granted sua sponte on the part of the court.

(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court.

(b) The court will receive a motion to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The motion to dismiss or affirm shall be filed with the clerk in conformity with Rule 27 of the Federal Rules of Appellate Procedure.

The appellant shall have ten days from the date of receipt of the motion to dismiss or affirm within which to file a response opposing the motion. Such response may be typewritten and four copies, with proof of service, shall be filed with the clerk. Upon the filing of such response, or the expiration of the time allowed therefor, or express waiver of the right to file, the record on appeal, motion and response shall be distributed by the clerk to the court for its consideration.

After consideration of the papers distributed pursuant to the foregoing paragraph the court will enter an appropriate order.

The time for filing briefs pursuant to Rule 31 of the Federal Rules of Appellate Procedure shall not be tolled or extended by the filing of a motion to dismiss or affirm.

RULE 20

FRIVOLOUS AND UNMERITORIOUS APPEALS

If upon the hearing of any interlocutory motion or as a result of a review under Rule 17, it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed without the notice contemplated in Rules 18 and 19.

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